# United States Court of Appeals for the Second Circuit



# APPELLANT'S APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

THE CITY OF ROCHESTER, Individually and on behalf of Donald Bunch; and DONALD BUNCH, Individually and on behalf of all others similarly situated,

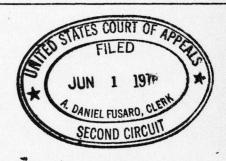
Plaintiffs-Appellants,

-vs-

THE MONROE COUNTY CIVIL SERVICE COMMISSION consisting of GERALD B. HANNA, MICHAEL D. CERAME, JOSEPH T. DEVITT, ROBERT G. NELLIS and GEORGE H. SCHEIBLE, Commissioners, and its Executive Director, FREDERICK W. LAPPLE,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK



#### APPENDIX

LOUIS N. KASH, Esq. Corporation Counsel of the City of Rochester Attorney for Plaintiffs-Appellants 46 City Hall Rochester, New York 14614 Telephone: (716) 428-6986

PAGINATION AS IN ORIGINAL COPY

# TABLE OF CONTENTS

Page
SUMMONS
COMPLAINT
ORDER TO SHOW CAUSE
AFFIDAVIT OF LOUIS N. KASH IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION
MOTION TO DISMISS AND VACATE ORDER TO SHOW CAUSE
AFFIDAVIT OF JOSEPH C. PILATO IN SUPPORT OF MOTION TO DISMISS AND VACATE ORDER TO SHOW CAUSE
AFFIDAVIT OF PAUL W. BRAYER AND H. BRENT MATTHEWSON IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION
AFFIDAVIT OF JEFFREY SWAIN IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION
AFFIDAVIT OF PAUL O. HARRISON OPPOSING PRELIMINARY INJUNCTION
ANSWER OF DEFENDANTS MONROE COUNTY  CIVIL SERVICE COMMISSION, HANNA,  CERAME, DEVITT, NELLIS, SCHEIBLE  AND LAPPLE
DECISION AND ORDER
NOTICE ON APPEAL
CERTIFICATE OF SERVICE

# United States District Court

#### FOR THE

WESTERN DISTRICT OF NEW YORK

CIVIL ACTION FILE NO. 75-266

THE CITY OF ROCHESTER, Individually and on behalf of Donald Bunch; and DONALD BUNCH, Individually, and on behalf of all others similarly situated,

Plaintiff s

SUMMONS

THE MONROE COUNTY CIVIL SERVICE COMMISSION consisting of GERALD B. HANA, MICHAEL D. CERAME, JOSEPH T. DEVITT, ROBERT B. NELLIS and GEORGE H. SCHEIBLE, Commissioners and its Executive Director, FREDERICK W. LAPPLE; and the STATE OF NEW YORK,

Defendant s

To the above named Defendant S:

You are hereby summoned and required to serve upon LOUIS N. KASH, CORPORATION COUNSEL.

plaintiff's attorney , whose address 15

46 City Hall Rochester, New York 14614

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Clerk of Court.

Deputy Clerk.

Date: July 3, 1975

[Scal of Court]

NOTE:-This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

VS.

THE CITY OF ROCHESTER, Individually, and on behalf of Donald Bunch; and DONALD EUNCH, Individually, and on behalf of all others similarly situated,

COMPLAINT

Plaintiffs,

Civil Action No. 75-266

THE MONROE COUNTY CIVIL SERVICE COMMISSION Consisting of GERALD B. HANNA, MICHAEL D. CERAME, JOSEPH T. DEVITT, ROBERT B. NELLIS and GEORGE H. SCHEIBLE, Commissioners, and its Executive Director, FREDERICK W. LAPPLE; and the STATE OF NEW YORK,

Defendants.

- 1. This is an action for a declaratory judgment and a permanent injunction. The action arises under the Constitution of the United States, particularly the Fourteenth Amendment thereto, and the statutes of the United States, particularly Title VII of the United States Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act of 1972. The Court has jurisdiction over this action pursuant to 28 U.S.C. §§1343, 2201 and 2202, and 42 U.S.C. §1983.
- 2. The Plaintiff City of Rochester is a municipal corporation established under a charter granted by the State of New York and is also a public employer.
- 3. The Plaintiff Donald Bunch is a black male over 21 years of age.
- 4. The Defendant State of New York is one of the States of the United States, and as such has enacted into law a statute of general and statewide application known as the New York State Civil Service Iaw.
- 5. The individually named Defendants are the Commissioners and the Executive Director of the Monroe County Civil Service Commission, the local public body charged with the administration of the New York State Civil Service Law in Monroe County. They are not sued in their individual capacity.

- 6. The City of Rochester has employed Donald Bunch in various positions and capacities for many years. More recently, pursuant to §65 of the New York State Civil Service Law, the City appointed Mr. Bunch to the position of recreation sector leader in a provisional capacity. Mr. Bunch has served very effectively in this position for several months.
- 7. As defined by §65 of the Civil Service Law, appointment to a position in a provisional capacity is authorized pending the establishment of a list of persons eligible for permanent appointment to the position as a result of their having passed a competitive examination designed to measure merit and fitness for the position. By definition, therefore, provisional appointments are non-permanent.
- 8. After his provisional appointment, Donald Bunch took and passed a competitive civil service examination for the position of recreation sector leader. Several other persons also took and passed said examination.
- 9. Said examination was administered and graded pursuant to \$\\$50 through 52 of the Civil Service Law by the Monroe County Civil Service Commission. All persons passing said examination were ranked in order of their final scores on said examination, and were placed on a list of those eligible for permanent appointment to the position of recreation sector leader. Donald Bunch was ranked number 17, out of 19 persons who passed said examination.
- 10. The City of Rochester, pursuant to the requirements and guidelines of Title VII of the United States Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act of 1972, and the rules and regulations promulgated pursuant thereto has duly established an Affirmative Action Plan to foster the recruitment, hiring and promotion of members of minority groups in public employment in the City of Rochester. A copy of

said Affirmative Action Plan is attached hereto and made a part hereof as Exhibit A.

11. By letter dated June 20, 1975, the City of Rochester, by its Personnel Director Paul W. Brayer, requested the Monroe County Civil Service Commission to certify as eligible for permanent appointment to the position of recreation sector leader in the City of Rochester the name of Donald Bunch. Mr. Brayer stated the basis of his request as follows:

"...Mr. Bunch is a member of a minority group, and the only such member to take and pass the exam for this position. Pursuant to federal guidelines the City of Rochester has formally established a written affirmative action plan with stated goals for the employment of minority group members and women in municipal service. The permanent appointment of Mr. Bunch to this position would clearly be in furtherance of this plan and these goals."

A copy of said request is attached hereto and made a part hereof as Exhibit B.

Service Commission, by its Executive Director Frederick W. Lapple, replied to the aforementioned request of Paul W. Brayer by denying said request on the ground that Section 61 of the New York State Civil Service Law restricts certification for permanent appointment to the three highest scoring persons who passed the civil service examination and that Mr. Bunch was not among those persons. A copy of Mr. Lapple's reply is attached hereto and made a part hereof as Exhibit C. The relevant language of §61 of the Civil Service Law reads as follows:

"1. Appointment of promotion from eligible lists. Appointment or promotion from an eligible list to a position in the competitive class shall be made by the appropriate civil service commission as standing highest on such eligible list..."

- exclude from permanent appointment to positions of public employment all those persons who have passed a civil service examination, thereby demonstrating minimum merit and fitness, but who have not placed among the top three examinees. Upon information and belief, a disproportionately high number of minority group members who pass civil service examinations do not place among the top three examinees. Thus, §61 has a disparate effect on minority group members in that it operates to exclude artificially, arbitrarily and unreasonably from permanent public employment qualified minority group members in violation of the Fourteenth Amendment to the United States

  Constitution and Title VII of the Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act of 1972. The Court has jurisdiction over this action pursuant to 28 U.S.C. §§1343, 2201 and 2202, and 42 U.S.C. §1983.
- 14. Section 61 of the Civil Service Law unlawfully obstructs the effective implementation of the City's affirmative action plan to foster the recruitment, hiring and promotion of qualified minority group members which was established pursuant to Title VII of the United States Civil Rights Act of 1964 as amended by the Economic Opportunity Act of 1972, and the regulations promulgated thereunder.

# WHEREFORE, the Plaintiffs request

(1) a declaratory judgment that Section 61 of the New York State Civil Service Law violates the Fourteenth Amendment to the United States Constitution and the United States Civil Rights Act of 1964 as amended by the Economic Opportunity Act of 1972 to the extent that it discriminates against the appointment and promotion of minority group members to permanent positions of public employment, and to the extent that it obstructs unlawfully

the effective implementation of the City's affirmative action plan; and

(2) an order restraining and enjoining the Defendants and each of them, and their successors in office, and all their employees and others acting for them or in concert with them, from enforcing the provisions of Section 61 of the New York State Civil Service Law to the extent that said Section requires permanent appointment or promotion to positions of public employment only from among the three highest standing persons who have taken and passed a competitive civil service examination; and

(3) for such other and further relief as may seem necessary or appropriate to the Court.

LOUIS N. KASH

CORPORATION COUNSEL, CITY OF ROCHESTER

Department of Law

46 City Hall

Rochester, New York 14614

STATE OF NEW YORK COUNTY OF MONROE CITY OF ROCHESTER

SS:

H. BRENT MATTHEWSON, being duly sworn, says that he is the Affirmative Action Officer of the City of kochester, a Plaintiff herein. He has read the foregoing complaint and the allegations contained therein are true to his knowledge, except those stated to be upon information and belief, and as to those he believes them to be true.

H. Brent Matthewson

Sworn to before me this

sworn to before me this

1975.

Notary Public

day of

Louis N. Kash

HOTARY PUBLIC, State of M. Y., Montaling.

My Commission expires March 50, 10.

STATE OF NEW YORK COUNTY OF MONROE CITY OF ROCHESTER

SS:

DONALD BUNCH, being duly sworn, says that he is the Plaintiff herein. He has read the foregoing complaint and the allegations contained therein are true to his knowledge, except those stated to be upon information and belief, and as to those he believes them to be true.

Sworn to before me this

2 day of

Notary Public

Louis N. Kash

NOTARY PUBLIC, State of N. Y., Monro 30, My Commission expires March 30, 19.

AFFIRMATIVE ACTION
POLICIES AND PRINCIPLES STATEMENT

#### RESOLUTION

WHEREAS, the Council of the City of Rochester hereby reaffirms its policy of equal employment opportunity for all persons regardless of such extraneous factors a 2, color, sex, religion, or national origin, and

WHEREAS, the Cit\_ Juncil recognizes that to ensure full equal employment opportunity and representation for all persons throughout City government, aggressive, on-going Affirmative Action programs must be developed and implemented;

NOW, THEREFORE, BE IT RESOLVED THAT, the City Council hereby authorizes and directs the City Manager to develop and implement an Affirmative Action Program Plan for the City of Rochester to include, but not be limited to, the following:

#### I. Goals and Timetables

- A. Establishment of goals and timetables for the recruitment and promotion of minorities and women.
- B. Representation of minorities and women in all job categories throughout City government at least in proportion to their percentages in the City's labor force; The City Manager is directed to employ every feasible means in an effort to achieve this goal within five years, recognizing that the rate of progress in each job category will vary depending upon turnover and expansion or contraction within job categories.

#### II. Methods

- A. Evaluation of existing personnel practices and procedures; that is, recruitment, selection, promotion, transfer and training.
- B. Establishment of upward mobility and career development programs.
- C. Establishment of a vigorous and continuous campaign to recruit, select, train and promote women and minorities.
- D. Development of trainee positions, designed to facilitate promotion into middle and upper-level job categories.



# III. Administrative Responsibility

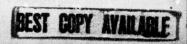
- A. The City Manager shall be responsible for the administration of Affirmative Action across all organizational lines.
- B. Department Heads shall be responsible for implementation of Affirmative Action Plans within their departments.
- C. The Affirmative Action Officer shall monitor and evaluate the City's Affirmative Action Program and provide technical assistance and guidance to Department Heads; and shall coordinate all Affirmative Action activities, and provide the City Manager with timely reports on progress and problems with recommendations for corrective action.
- D. The Personnel Director shall coordinate Affirmative Action with personnel related functions, i.e., employment, payroll and benefits administration, job classification and training.

# IV. Review Responsibility

The City Manager will appoint an Affirmative Action Board of Peview to assist in reviewing and evaluation Departmental Affirmative Action Plans and progress on the execution of the City's Affirmative Action Plan; and to recommend appropriate remedial action to the Affirmative Action Officer.

# The Board of Review Shall

- 1. Review and comment on Affirmative Action Plans, guidelines and periodic progress reports.
- 2. Advise on the establishment of guidelines for full implementation of the provisions of the City's Affirmative Action Plan.
- 3. Evaluate Civil Service and personnel practices, which relate to the goals of increased employment of minorities and women.
  - 4. Have access to appropriate documents, statistics and written policies of City Government with regard to Civil Service and personnel, except those specifically prohibited by law.
  - 5. When position of Affirmative Action Officer is vacant, appoint three of its members to assist the Personnel Director and the City Manager in screening candidates for Affirmative Action Officer.
  - 6. Periodically review census of minority members in the City work force as prepared by the Personnel Bureau.
  - 7. Review guidelines for contract compliance by June, 1975.



#### V. Reporting

The City Manager shall submit an annual Affirmative Action progress report to the City Council containing a census of the employee population by race, sex, and job category.

# VI. Contract Compliance

The City Hanager shall be directed to develop and implement contract compliance procedures beginning on and continuing after January 1, 1975.

All City contractors, lessors, vendors, and suppliers will be sent copies of the City's Affirmative Action policy statement. The City will include non-discrimination clauses in all bid documents, contracts and leases. Contractors, lessors, vendors and suppliers shall agree to comply with all state and federal equal employment opportunity laws and regulations, and shall submit documentation regarding equal opportunity and affirmative action as required or requested by the City. The City will give preference in the award of all contracts and leases to contractors, lessors, vendors and suppliers who have or participate in a written Affirmative Action Plan, wherever such preference is legal and feasible.

CITY OF ROCHESTER, NEW YORK
AFFIRMATIVE ACTION PLAN

February, 1975

Elisha C. Freedman City Manager

# TABLE OF CONTENTS

	INTRODUCTION	i
ı.	AFFIRMATIVE ACTION POLICY	1
ıı.	ULTIMATE GOAL	1
III.	GENERAL OBJECTIVES	1
ıv.	ADMINISTRATIVE DUTIES AND RESPONSIBILITIES	1-5
v.	MINORITY GROUPS	5
vi.	LABOR FORCE STATISTICS FOR MINORITIES AND WOMEN	6
VII.	MINORITY AND FEMALE WORK FORCE COMPOSITION FOR CITY GOVERNMENT	6
VIII.	CREATION AND IMPLEMENTATION OF DEPARTMENTAL AFFIRMATIVE ACTION PLANS	6-7
ix.	JOB RESTRUCTURING AND UPWARD MOBILITY	7-8
x.	RECRUITMENT	8
xr.	SELECTION	9
XII.	PROMOTION	9
хии.	TRAINING AND EDUCATION	9-10
xiv.	DISSEMINATION OF AFFIRMATIVE ACTION POLICY	10-11
xv.	CONTRACT COMPLIANCE	11
xvi.	INTERNAL AUDIT AND REPORTING	11
	APPENDIX A, B, C, and D	

# INTRODUCTION

Mineteen seventy-four marked the end of an important decade in American history. It has been ten years since the enactment of the Civil Rights Act of 1964, the first major anti-discrimination legislation in nearly one hundred years.

It has been an intense ten years which has seen extensive Federal, State and local legislation, several Presidential Executive Orders, and a number of landmark Supreme Court decisions, all of which mandate that employers take positive action to eliminate employment discrimination based on race, color, sex, religion or national origin.

Today, it is not enough for employers to merely pronounce that they are an "Equal Opportunity Employer". All too often, these pronouncements remain in the realm of rhetoric and are eventually reduced to vague and empty words. This fact becomes more clear when one inspects employment statistics which reveal that minorities and women are still subject to discriminatory employment patterns and practices and suffer disproportionately from the effects of pervasive discrimination.

The time has come for employers to thoroughly examine their employment systems and ferret out invidious barriers to equal employment opportunities for minorities and women. To achieve this end, aggressive, ongoing affirmative action is needed.

The City of Rochester is committed to the philosophy of Affirmative Action and to achieving fair and equitable employment practices and procedures.

What we have outlined in this plan are necessary steps toward ensuring that all persons, regardless of race, color, sex, religion, or national origin, will have equal employment opportunity in City government. However, this plan is only the beginning, and to think that because we have this plan our job is done would be to delude ourselves. Our work is before us. Our goals and objectives will be realized only through our tenacious efforts and firm commitment to Affirmative Action.

Elika de Procuman, mous

City Manager

#### CITY OF ROCHESTER AFFIRMATIVE ACTION PLAN

# I. AFFIRMATIVE ACTION GENERAL POLICY STATEMENT

It is the policy of the City of Rochester to meet its responsibility of equal employment opportunity for all persons regardless of race, color, sex, religion, or national origin. The City recognizes its moral and legal obligations to take affirmative and decisive action to improve employment opportunities for minorities and women who have historically been discriminated against in their quest for economic security and human dignity.

# II. ULTINATE GOAL

A. To eradicate employment discrimination based on race, color, sex, religion, or national origin at all job levels throughout City government.

# III. GENERAL OBJECTIVES

- A. To achieve representation of minorities and women in all job categories throughout City government at least in proportion to their percentages in the City's labor force.
- B. To increase the proportion of minorities and women in middle and upper job categories (Official and Administrative, Professional, Technician, and Protective Services) from which they have traditionally been barred.
- C. To evaluate all personnel policies and procedures in order to identify and eliminate artificial barriers to the employment of minorities and women.
- D. To establish a vigorous and continuous campaign to recruit, select, train, and promote minorities and women.

# IV. ADMINISTRATIVE DUTIES AND RESPONSIBILITIES

# A. CITY MANAGER SHALL:

- 1. Be responsible for the administration of Affirmative Action across all organizational lines.
- 2. Review each individual department head's Affirmative Action performance at least once a year.
- 3. Ensure that department heads promote equal employment opportunity policies and practices in all departmental operations.
- 4. Ensure that all City personnel comply with the goals and objectives of the Affirmative Action Plan.

#### B. PERSONNEL DIRECTOR SHALL:

1. Coordinate Affirmative Action with other personnelrelated functions, i.e., employment, payroll and benefits administration, job classification and training.

#### C. AFFIRMATIVE ACTION OFFICEP SHALL:

- 1. Coordinate the City's Affirmative Action Program and provide guidance and direction to and monitor the administration of departmental affirmative action programs.
- 2. Provide the City Manager with timely reports on progress and problems with recommendation for corrective action.
- 3. Serve as liaison between City Administration and Affirmative Action Board of Review.
- 4. Provide technical advice and guidance to Department Heads and designated subordinate management level personnel on methods and procedures for effective recruitment, selection and placement and promotion of minority personnel and women.
- 5. Peview regularly departmental affirmative action programs with departmental affirmative action coordinators to determine status.
- 6. Coordinate with Employment and Technical Services
  Divisions of Personnel Bureau in development and implementation of effective recruitment, selection, placement,
  promotion, training and appraisal programs designed to
  effectuate successful employment and promotional programs
  for minority and women employees.
- 7. Coordinate with Employment and Pavroll Services Division of the Personnel Bureau in the collection and analysis of employment, promotion and turnover data as it relates to minority and female employees.
- 8. Review and recommend modifications to job descriptions.
- 9. Develop and implement training and development programs designed to facilitate upward job mobility for minority and female employees.
- 10. Coordinate with Monroe County Civil Service Commission relative to validating examinations, recruiting activities and development of entry level job requirements designed to facilitate employment of minorities and women.

11. Evaluate, audit and provide guidance in the implementation of departmental affirmative action programs. Assist in the development and implementation of career ladders in all City departments. 13. Coordinate with Employment Division to assure adequate dissemination of information relative to employment opportunities. Provide guidance and counsel to Labor Relations personnel to assure adequate affirmative action input in the negotiations process and labor agreement administration. Provide staff assistance to other City staff in pursuing compliance of City contractors with Affirmative Action requirements. Provide public information regarding affirmative action 1.6. to the community. DEPARTMENT HEADS SHALL: Department Meads shall be held accountable for implementation of Affirmative Action Plans within their department. Appoint a high-level management person as departmental 2. Affirmative Action Coordinator. This appointment is necessary to assure that Affirmative Action receives top priority and management support within the departments. Analyze existing employment problems and implement corrective measures where necessary. Review supervisory performance to ensure positive application and vigorous enforcement of Affirmative Action policies and principles. Assist in the resolution of any and all personnel problems related to Affirmative Action. E. DEPARTMENTAL AFFIRMATIVE ACTION COORDINATORS SHALL: Collect and synthesize employment data for the purpose of establishing departmental employment goals for minorities and women. Identify existing departmental employment problems and recommend to department heads and the Affirmative Action Officer corrective action. :17

8. Inform employees of the availability of career services, job opportunities, and training programs.

9. Assist in the resolution of discrimination complaints and other problems associated with equal employment opportunity.

# F. AFFIRMATIVE ACTION BOAPD OF REVIEW:

The City Manager will appoint an Affirmative Action Board of Review to assist in reviewing and evaluating Departmental Affirmative Action Plans and progress on the execution of the City's Affirmative Action Plan; and to recommend appropriate remedial action to the Affirmative Action Officer.

The Board of Review shall consist of fifteen (15) members and shall be comprised of representatives from affected target groups, employee groups and other community organizations.

Members shall serve for a term of three (3) years except that initial appointments to the Board shall be for terms of office as follows:

First 5 members 1 year Second 5 members 2 years Third 5 members 3 years

Members shall be eligible to succeed themselves on the Board.

The Affirmative Action Officer shall be Executive Secretary of the Board who shall prepare the agenda for the monthly meetings and provide necessary administrative services.

The Board of Review shall choose its own Chairperson and adopt its own By-laws.

# The Board of Review Shall:

- 1. Review and comment on Affirmative Action Plans, quidelines and periodic progress reports.
- 2. Advise on the establishment of guidelines for full implementation of the provisions of the City's Affirmative Action Plan.
- 3. Evaluate Civil Service and personnel practices, which relate to the goals of increased employment of minorities and women.
- 4. Have access to appropriate documents, statistics and written policies of the City government with regard to Civil Service and personnel, except those specifically prohibited by law.
- 5. When position of Affirmative Action Officer is vacant, appoint three of its members to assist the Personnel Director and the City Manager in screening candidates for Affirmative Action Officer.
- 6. Periodically review census of minority members in the City work force as prepared by the Personnel Bureau.
- 7. Review guidelines for contract compliance by June, 1975.

#### V. MINORITY GROUPS

# A. DEFINITION:

Minority groups for statistical and report purposes have been defined as follows:

- 1. BLACK: persons of African descent including West Indians
- 2. SPANISH- persons of Puerto Rican, Cuban, Mexican, SURNAMED: Latin, or Spanish descent
- 3. AMERICAN Native Americans INDIANS:
- 4. ASIAN persons of Chinese, Japanese, Korean, or AMERICANS: Filipino descent.
- 5. OTHERS: includes Eskimos, Malavans and all ethnic groups not classified above

LABOR FORCE STATISTICS FOR MINORITIES AND HOMEN MINORITIES: According to the 1970 Census, minorities comprised approximately 17 percent of the total labor force in the City of Rochester. It has been estimated that by 1990, minorities will represent approximately 25 percent of the City's labor force. Consequently, the City's five-year minority employment goal will be the attainment of Labor force parity (25 percent)\* in all job categories, recognizing that the rate of progress in each job category will vary depending upon turnover and expansion or contraction within job categories. WOMEN: In 1970, women compriese 43 percent of the City's labor force; however, it becomes somewhat difficult to project an accurate future labor force percentage for women. One very important reason is that there is a significant percentage of women who choose either to leave or not to enter the labor market because of domestic considerations. Therefore, the 43 percent\* (in all job categories) will be used as a tentative

\*The 25 percent minority figure includes all minority group members; i.e., both minority males and females (See Section V p.5). The 43 percent female figure includes all females. The goal of the plan for each group should be considered separately, and not cumulatively.

goal, and this goal will be reviewed annually to reflect accur-

# VII. HINORITY AND FEMALE WORK FORCE COMPOSITION FOR CITY GOVERNMENT

# A. TABLE 1.

Table 1 (Appendix D) presents a breakdown of the City's minority and female work force as of December 31, 1974.

# VIII. CREATION AND IMPLEMENTATION OF DEPARTMENTAL APPIREMATIVE ACTION PLA

# A. DEPARTMENTAL APPIRMATIVE ACTION PLANS SHALL:

- 1. Be based on the model which is included as Appendix A. Appendix B contains the definitions of the job families or categories (taken from the EEO-4 Peport) to be utilized in the plans.
- 2. Outline percentage goals (using labor force ratios) and timetables for increased minority and female employment. In addition to numerical goals, action plans are to outline specific problems and deficiencies and recommendations for corrective actions.

# B: DEPARTMENTAL GOALS SHALL:

- Be realistic, measurable and significant and will reflect at least the percentage of minority groups and women in the City's labor force.
- 2. Consider rates of turnover, expansion and contraction in establishing specific result-oriented approaches to increasing employment of minorities and women.
- 3. Address the under-utilization and concentration of minorities and females in lower level job categories and provide specific remedies.
- 4. Address all aspects of personnel administration and, where necessary, establish corrective steps to eradicate artificial barriers to increased minority and female employment.

# C. DEPARTMENTAL TIMETABLES SHALL:

1. Be based on a five-year time frame; however, if departmental goals and objectives can be accomplished in a shorter period of time due to increased availability of required skills in the labor market, unexpected expansion, high turnover, then efforts should be made to ensure that this will be done.

# IX. JOB RESTRUCTURING AND UPWARD MOBILITY

# A. JOB SPECIFICATIONS:

- 1. The City will commence a review of job specifications by department beginning on and continuing after January 1, 1975.
- 2. The City will request the Monroe County Civil Service Commission to review the revised job specifications on a regularly scheduled basis.
- 3. In the review of job specifications, every attempt will be made to remove those requirements or qualifications that are not job-related thereby assuring that barriers to equal opportunity are eliminated.
  - 4. The City will request the Monroe County Civil Service Commission to assist in developing measures by which the validity of job specifications might be appraised.

#### B. UPWARD MODILITY:

- 1. Career ladders will be developed within each department to encourage upward mobility for all employees.
- 2. Training programs will be developed and implemented to provide impetus to upward mobility and job improvement. Training programs will be designed to provide promotional preparation for employees and enhance opportunities for employment among minorities and women.
- 3. Each department will develop appropriate entry level trainee positions for all job categories with emphasis on higher and middle job categories, i.e., official and administrative, professional, technician, and protective services.

#### X. RECRUITMENT

# A. PESPONSIBILITY:

1. The Personnel Department is responsible for developing and maintaining an aggressive, comprehensive and exhaustive recruitment program.

# B. METHODS:

- 1. The Personnel Department will establish and maintain a list of all organizations representing racial minorities and women. Notices of City job openings will be sent to these organizations.
- 2. The Affirmative Action Officer will develop a cooperative working relationship with community groups, high schools, educational institutions and other agencies that are concerned with the employment of minorities and women.
- 3. The Personnel Department will establish and maintain a system of retaining and retrieving minority and female applications.
- 4. The Personnel Department will develop recruiting literature, and where photographs are used, minority and women employees will be shown.
- 5. There will be effective utilization of all media in disseminating job information.



#### XI. SELECTION

# A. SELECTION PROCEDURES:

- 1. The Monroe County Civil Service Commission will be urged to develop validated selection procedures for the City of Rochester, and assure that selection standards and procedures comply with the doctrine of the U.S. Supreme Court decision of Gridgs vs. Duke Power, and with the U.S. Equal Employment Opportunity Commission Guidelines. All City departments shall cooperate with and assist the Monroe County Civil Service Commission upon request in the process of test validation.
- 2. Where it will enhance the opportunity for the appointment of minorities and women, dual lists by City residence will be requested from open competitive examinations.
- 3. The City will request the Monroe County Civil Service Commission to include minority group members and women on oral examining boards and interviewing committees.

# XII. PROMOTION

# A. PROMOTIONAL OPPORTUNITIES:

- 1. The Affirmative Action Coordinators will periodically review the qualifications of minority and female employees. Each department will recommend to the Personnel Bureau for training or promotion those individual employees who are qualified for higher-level positions.
- 2. The Personnel Bureau will be responsible for advertising promotional opportunities to all employees.

# XIII. TRAINING AND EDUCATION

# A. CARDER DEVELOPMENT:

- 1. The Personnel Bureau shall develop and implement career counseling programs for minority and women employees regarding opportunities and career development programs offered by the City. The departmental Affirmative Action Coordinators shall assist such employees to formulate plans for career advancement.
- 2. The City shall provide training for management and supervisory personnel in Affirmative Action policies and principles. Such training will equip management to deal with problems of minorities and women and other related Affirmative Action problems.

# XIV. DISSEMINATION OF APPIRMATIVE ACTION POLICY

#### A. INTERNAL:

- 1. The City Manager will meet with Department Heads at least twice a year to discuss the City's Affirmative Action Plan and to reaffirm the City's commitment to Affirmative Action.
- 2. Department Heads will meet regularly with subordinate level management personnel to disseminate Affirmative Action policies and procedures. Each department is responsible for developing a mechanism to inform each employee of the Affirmative Action policy.
- 3. The City's Affirmative Action policy will be explained in all orientation programs for new employees.
- 4. The Affirmative Action policy will be stressed in top-management and supervisory training programs.
- 5. A copy of the City's Affirmative Action Plan will be available in each department.

#### B. EXTERNAL:

- 1. Written notification of the City's Affirmative Action Policy will be sent to local minority and women's organizations, all other recruitment sources, and temporary help services.
- 2. The City shall utilize advertising, publications, postings and other forms of communications and contact to disseminate Affirmative Action Policy. Special efforts will be made to disseminate Affirmative Action Policy through local media programs geared for minority audiences.
- 3. The City's collective bargaining agreements shall contain an anti-discrimination clause covering all parts of the agreement.
- 4. The phrase, "Equal Opportunity Employer" shall appear on official City letterhead and recruitment literature.

# XV. CONTRACT COMPLIANCE

A. All City contractors, lessors, vendors, and suppliers will be sent copies of the City's Affirmative Action policy statement. The City will include non-discrimination clauses in all bid documents, contracts and leases. Contractors, lessors, vendors and suppliers shall agree to comply with all state and federal equal employment opportunity laws and regulations, and shall submit documentation regarding equal opportunity and affirmative action as required or requested by the City. The City will give preference in the award of all contracts and leases to contractors, lessors, vendors and suppliers who have or participate in a written Affirmative Action Plan, wherever such preference is legal and feasible.

# XVI. INTERNAL AUDIT AND REPORTING

# A. EVALUATION:

- •1. The Affirmative Action Officer working with departmental Affirmative Action Coordinators will establish a system of recording employment statistics of all City departments to determine whether or not affirmative action goals and timetables are being met.
- 2. The Affirmative Action Officer will prepare and submit a quarterly report on the status of the affirmative action program to the Personnel Director, City Manager, Board of Review, Mayor, and Council.
- 3. The Affirmative Action Board of Review will evaluate progress reports on affirmative action and will recommend to the City Manager corrective action where there has been unsatisfactory performance.
- 4. Once a year a complete and thorough review of departmental action plans will be conducted by the Affirmative Action Officer to assess overall performance.

#### APPENDIX "A"

#### EXPLANATION

Appendix A contains the structure for the goals and timetables for the City and departmental Affirmative Action Plans.

- Box A contains current data and percentages.
- Box B will contain the percentage and number of replacements for the first year.
- Box C will contain the starting figure for the beginning of the second year; that is, a total of Boxes A and B.
- Boxes D J The process described for Boxes B and C will be followed for years 2 through 5 and will be reflected in Boxes D through J.

) CATEGORIES	1974-1975	1975-1976 .		1977-1978	1978-1979
TOTAL	(A) PRESENT WOMEN (B) NO. OF ROJECTED PLACEMENTS NO.	OF PROJECTED EXPLACEMENTS No.	(E) C + D=(F) OF DMOJECTED REPLACEMENTS No	G) E + F= (H) OF PROJECTED PEPLACEMENTS NO.	G + H= 21  OF PROJECTED  PEPLACEMENTS  No.
ADMINISTRATION					
PROFESSIONAL					
:ECHNICIANS					
ROTECTIVE ERVICES					
PARA- NOFESSIONAL	1				
CLERIĆAL					

		. maid-fail	1977-1978	1978-1979
SKILLED CRAFT				
SERVICE/MAINT.	/.			
28				
				/

â

B CATEGORIES	1974-1975	1975-1976	. 1976-1977	1977-1978	7312-7313
TOTAL .	PRESENT MINORATY NO. 3 (B), THE ROJECTED XIPLACEMENTS NO	(C)  A + B= (D)  OF PROJECTED  REPLACEMENTS  No.	C + D= (F) OF PROJECTED PZPLACEMENTS No.	G) E + F= (H) OF MOJECTED DEPLACEMENTS No.	OF PROJECTED PERLACEMENTS
MINISTRATION					
ROFESSIONAL					
ECHNICIANS				. /	
POTECTIVE ERVICES					
PARA- Dressional					
Clerión					

Ø

. /				1977-1978	1978-1979
DE CATEGORIES	1974-1975	1975-1976	. 1976-1977	1977-1978	1978-1979
SKILLED CRAFT .					
SERVICE/MAINT.					
30					

#### JOB CATEGORIES

OFFICIALS AND ADMINISTRATORS: Occupations in which employees set broad policies, exercise overall responsibility for execution of these policies, or direct individual departments or special phases of the agency's operations, or provide specialized consultation on a regional, district or area basis. Includes: department heads, bureau chiefs, division chiefs, directors, deputy directors, controllers, examiners, wardens, superintendents, unit supervisors, sheriffs, police and fire chiefs and inspectors and kindred workers.

PROFESSIONALS: Occupations which require specialized and theoretical knowledge which is usually acquired through college training or through work experience and other training which provides comparable knowledge. Includes: personnel and labor relations workers, social workers, doctors, psychologists, registered nurses, economists, dieticians, lawyers, system analysts, accountants, engineers, employment and vocational rehabilitation counselors, teachers or instructors, police and fire captains and lieutenants and kindred workers.

TECHNICIANS: Occupations which require a combination of basic scientific or technical knowledge and manual skill which can be obtained through specialized post-secondary school education or through equivalent on-the-job training. Includes: computer programmers and operators, draftsmen, surveyors, licensed technicians, (medical, dental, electronic, physical sciences), assessors, inspectors, police and fire sergeants and kindred workers.

PROTECTIVE SERVICE WORKERS: Occupations in which workers are entrusted with public safety, security and protection from destructive forces. Includes: police patrol officers, fire fighters, guards, deputy sheriffs, bailiffs, correctional officers, detectives, marshals, harbor patrol officers and kindred workers.

PARAPPOPESSIONALS: Occupations in which workers perform some of the duties of a professional or technician in a supportive role, which usually require less formal training and/or experience normally required for professional or technical status. Such positions may fall within an identified pattern of staff development and promotion under a "New Careers" concept. Includes: library assistants, research assistants, medical aides, child support workers, police auxiliary, welfare service aides, recreation assistants, homemakers aides, home health aides, and kindred workers.

OFFICE AND CLEPTCAL: Occupations in which workers are responsible for internal and external communication, recording and

retrieval of data and/or information and other paper work required in an office. Includes: bookkeepers, messengers, office machine operators, clerk-typists, stenographers, court transcribers, hearing reporters, statistical clerks, dispatchers, license distributors, payroll clerks and kindred workers.

SKILLED CRAFT WORKERS: Occupations in which workers perform jobs which require special manual skill and a through and comprehensive knowledge of the processes involved in the work which is acquired through on-the-job training and experience or through apprenticeship or other formal training programs. Includes: mechanics and repairmen, electricians, heavy equipment operators, stationary engineers, skilled machining occupations, carpenters, compositors and typesetters and kindred workers.

SERVICE/MAINTENANCE: Occupations in which workers perform duties which result in or contribute to the comfort, convenience, hygiene or safety of the general public or which contribute to the upkeep and care of buildings, facilities or grounds of public property. Workers in this group may operate machinery. Includes: chauffeurs, laundry and dry cleaning operatives, truck drivers, bus drivers, garage laborers, custodial personnel, gardeners and groundkeepers, refuse collectors, construction laborers.

## APPENDIX "C"

The following organizational components within the City Government structure will be required to establish "departmental" Affirmative Action Plans:

Police
Fire
Community Development
Parks and Recreation
Public Library
Buildings and Property Conservation
Public Works
City Manager's Office (to include the following)

- -Program Development
- -Personnel
- -Finance
- -Labor Relations
- -Public Information
- -Law .
- -Courts

MINORITY AND FEMALE WORK FORCE COMPOSITION FOR CITY GOVERNMENT AS OF DECEMBER 31, 1974

	TOTAL NUMBER 'OF EMPLOY- EES	BLACK ;		SPANISH- SURNAMED		OTHER		WOMEN		TOTAL NON-WHITE	
		No.	8	No.	8	No.	%	No.	£	No.	٩
OFFICIALS AND ADM.	71	3	4.2	2 :	.2 , 8	-	<b>-</b> •	7.	9.9	5	7.0
PROFESS- IONAL	598 .	34	5 <b>.</b> .7	5	. 8	3 :	. 5.	12,1	20.2	42	7.0
TECHNI- CIANS	302	. 14	4.6	3	.10	1	.3	. 9	2.9	18	5.9
PROTECTIVE SERVICES	963	32	3.3	1	.1		-	4	.4	33	3.4
PARA PROFESS- IONAL	152.	40 ·	26.3	7	4,6		-	55	36.2	47	20.9
OFFICE/ CLERICAL	473	- 28	5.9	9	1.9	<b>-</b>	-	415	87.7	. 37	7.9
SKILLED CRAFT	261	25	9.6	12	4.6	1	. 1	1 .	.4	38	4.6
SERVICE/ MAIN.	987	281	29.5	95 ÷	9.6	1 .	.1	41	.4.1	377	38.2
TOTAL .	3307	. 457	12.0	134	3.5	6	.1	653	17.2	597	15.7

June 20, 1975

Fredrick W. Lapple, Executive Director
Civil Service Commission
County Office Building - Room 209
Rochester, New York 14614

Dear Mr. Lapple:

I hereby request you to certify as eligible for permanent appointment to the position of Recreation Sector Leader in the City of Rochester the name of Don Runch.

Mr. Bunch has passed the recent civil service examination for this position thereby demonstrating he possesses at least the minimum merit and fitness to do the job. In addition he has been serving very productively and sensitively in the position as a provisional appointme.

Most importantly, however, Mr. Bunch is a member of a minority group, and the only such member to take and pass the exam for this position. Pursuant to federal guidelines the City of Rochester has formally established a written affirmative action plan with stated goals for the employment of minority group members and women in municipal service. The permanent appointment of Mr. Bunch to this position would clearly be in furtherance of this plan and these goals.

Since June 21st is the last day on which to make such an appointment, I request that you certify Mr. Bunch as eligible by 4 o'clock this afternoon.

Very truly yours,

Paul W. Brayer DIRECTOR OF PERSONNEL

kd

EXHIBIT "B"

35

County of Monroe WEB STER 9117.1 NEW YORK JUN 20 3 35 PY '75 EXECUTIVE DIRECTOR **COMMISSIONERS** FREDRICK W. LAPPLE GERALD B. HANNA 209 COUNTY OFFICE BUILDING CHAIRMAN 39 MAIN STREET WEST ROCHESTER, NEW YORK 14614 MICHAEL D. CERAME JOSEPH T. DE VITT PHONE 454-7200 EXT. 519 ROBERT B MELLIS (AREA CODE 716) GEORGE H. SCHEIBLE CIVIL SERVICE COMMISSION AND OFFICE OF PERSONNEL AND HUMAN RESOURCES

June 20, 1975

Mr. Paul Brayer Personnel Director 57 City Hall Rochester, New York 14614

Dear Mr. Brayer:

At 11:21 this morning, I received your letter requesting a certification for Recreation Sector Leader for Donald Bunch to be forewarded to your office by 4:00 today.

In your haste to secure a certification, you may have overlooked the provisions of Section 61 of State Civil Service law that requires us to certify the three highest scoring eligibles for appointment to one vacancy. We have ascertained by phone that you intend to fill two vacancies.

In accordance with Section 61 of State Civil Service law we are certifying the four highest standing eligibles to fill two vacancies in the title of Recreation Sector Leader.

We are unable to certify the name of Mr. Bunch because his name is not among those eligibles presently certifiable for appointment under Section 61 of State Civil Service Law.

Sincerely,

Fredrick W. Lapple

Executive Director

Bediand B. Ostaman

BY: Richard B. Osterman

Manager of Civil Service

FWL/RBO/tn

EXHIBIT "C"

36

THE CITY OF ROCHESTER, Individually, and on behalf of Donald Bunch; and DONALD BUNCH, Individually, and on behalf of all others similarly situated,

Plaintiffs,

ORDER TO SHOW CAUSE

vs.

THE MONROE COUNTY CIVIL SERVICE COMMISSION Consisting of GERALD B. HANNA, MICHAEL D. CERAME, JOSEPH T. DEVITT, ROBERT B. NELLIS and GEORGE H. SCHEIBLE, Commissioners, and its Executive Director, FREDERICK W. LAPPLE: and the STATE OF NEW YORK,

Defendants.

Upon the verified complaint herein, and the attached affidavit of Louis N. Kash, Corporation Counsel of the City of Rochester, it is ordered that the Defendants show cause before this Court at the United States Courthouse, State Street, Rochester, New York on July 14, 1975 at 10:00 a.m. on or soon thereafter as Counsel may be heard, why this Court should not grant the following relief:

enjoining the Defendants, and each of them, and their successors in office, and all their employees and others acting for them or in concert with them, from taking any action to disturb in any way the present status of the Plaintiff Donald Bunch as a provisional employee of the City of Rochester in the position of recreation sector leader, including without limitation any failure or refusal by the Defendants to certify the payroll of Donald Dunch in such position or any attempt by the Defendants to

declare such position vacant and to fill it with another person, pending final judgment on the issues in this action.

appearing, that the Defendants, and each of them, and their successors in office, and all their employees and others acting for them or in concert with them, are temporarily restrained from taking any action to disturb in any way the present status of the Plaintiff Donald Bunch as a provisional employee of the City of Rochester in the position of recreation sector leader, as aforesaid, pending the determination by this Court of the motion for a preliminary injunction brought on by this Order to thow Cause and the entry of an appropriate order thereon.

It is further ordered that service of this Order to Show Cause and the paper upon which it is granted shall be made upon the defendants on or before July 7, 1975, by David F. Probst.

IS/ HAROLD P. BURKE

DATED: July 3 , 1975

THE CITY OF ROCHESTER, Individually, and on behalf of Donald Bunch; and DONALD BUNCH, Individually, and on behalf of all others similarly situated,

AFFIDAVIT

vs.

THE MONROE COUNTY CIVIL SERVICE COMMISSION Consisting of GERALD B. HANNA, MICHAEL D. CERAME, JOSEPH T. DEVITT, ROBERT B. NEILIS and GEORGE H. SCHEIBLE, Commissioners, and its Executive Director, FREDERICK W. LAPPLE; and the STATE OF NEW YORK,

Defendants.

Plaintiffs.

Louis N. Kash, being duly sworn, deposes and says:

- 1. I am an attorney and Counselor-At-Law, duly licensed to practice my profession in the State of New York, and am admitted to practice before the United States District Court for the Western District of New York. I am the Corporation Counsel of the City of Rochester.
- 2. This affidavit is made in support of the attached Order to Show Cause and the temporary restraining order contained therein.
- Judgment and a permanent injunction on the grounds that Section 61 of the New York State Civil Service Law violates the protection against racial discrimination guaranteed by the Fourteenth Amendment to the United States Constitution, and that said Section 61 unlawfully obstructs the effective implementation by the City of Rochester of its Affirmative Action Plan to recruit, hire and promote minority group members established pursuant to Title VII of the United States Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act of 1972 and the regulations promulgated thereunder.

- 4. Said Section 61 requires the Defendant Monroe County
  Civil Service Commission to certify as eligible for permanent appointment
  to any position in public employment only the three persons with the highest
  rank on a civil service examination given for a particular position. The
  effect of Section 61 is to eliminate from potential public employment all
  those individuals who have taken and passed a civil service examination
  but who have not placed among the top three examinees. A disproportionate
  number of minority group members fail to place among the top three examinees,
  although they have demonstrated minimum merit and fitness by taking and
  passing an exam. Thus, Section 61 operates, without sufficient good reason,
  to prevent the public employment of a significant number of qualified
  minority group members.
- in Paragraph 4 above. As a minority group member, he took a civil service examination for the position of recreation sector leader in the City of Rochester, and passed said examination but did not place among the top three examinees. In addition, Mr. Bunch has been serving very effectively for several months as a recreation sector leader in a provisional (i.e. non-permanent) capacity, and is still so serving. Thus, there is no question that he is qualified to do the job. However, the Monroe County Civil Service Commission, following Section 61 of the Civil Service Law, has refused to certify Mr. Bunch for permanent appointment as a recreation sector leader. It is this refusal that has given rise to this law suit.
- 6. The temporary restraining order (and preliminary injunction) sought herein would merely preserve the status quo by keeping the Plaintiff Donald Bunch in his present position as a recreation sector leader

-3-

on a provisional basis pending final determination of the constitutional and statutory issues raised in this action. Nothing in the proposed temporary restraining order (or preliminary injunction) would grant the ultimate relief requested in the complaint. Thus, the Defendants are in no way prejudiced or harmed. However, it is clear that if the temporary restraining order is not granted, the Plaintiff Bunch will be removed from his present job and the Defendants will have secured their ultimate objectives before the issues are even tried. Clearly, the Plaintiff Bunch will be irreparably harmed. In fact, the Defendant Monroe County Civil Service Commission has — as of this date (July 2, 1975) — refused to approve the Plaintiff Bunch's continued employment on a provisional basis.

- 7. The reason why this Order to Show Cause is being sought is to obtain a temporary restraining order and to being on the motion for a preliminary injunction as quickly as possible, in view of the Defendant Monroe County Civil Service Commission's refusal to allow the Plaintiff Bunch to continue in his present position on a provisional basis.
- 8. No notice to the Defendants herein of this request for a temporary restraining order should be required for the reasons that the temporary restraining order will not in any way prejudice or harm the Defendants, and also that the Defendants only informed the Plaintiff City of Rochester today (July 2, 1975) that the Defendants do not intend to allow the Plaintiff Bunch to continue in his present position provisionally and will not allow the Plaintiff Bunch to receive his paycheck on payday tomorrow (July 3, 1975).

Louis N. Kash

Sworn to before me this

3.2 day of July 1975.

Notary Public 17 1 Same

M. BERNECH MEDIAND

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41

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

THE CITY OF ROCHESTER, Individually and on behalf of Donald Bunch; and DONALD BUNCH, Individually, and on behalf of all others similarly situated,

Plaintiffs,

-vs-

THE MONROE COUNTY CIVIL SERVICE COMMISSION consisting of GERALD B. HANNA, MICHAEL D. CERAME, JOSEPH T. DEVITT, ROPERT B. NELLIS and GEORGE H. SCHEIBLE, Commissioners and its Executive Director, FREDERICK W. LAPPLE; and the STATE OF NEW YORK.

MOTION TO
DISMISS AND
VACATE ORDER
TO SHOW CAUSE

Civil Action File No. 75-266

Defendants.

Upon the attached opposing affidavit of Joseph C. Pilato,
Deputy County Attorney, of Counsel for the Monroe County Civil Service
Commission, the above defendant hereby moves this Court pursuant to
Rule 12 (b) of the Federal Rules of Civil Procedure, Title 28 USCA, to
dismiss and vacate an Order to Show Cause and Preliminary Injunction
signed by the Honorable Harold P. Burke, District Judge for the Western
District of New York dated July 3, 1975 in the above entitled proceeding
and further for an order to dismiss the summons and complaint of the
same entitled action, while reserving all rights of the defendant Monroe
County Civil Service Commission to answer, affirmative defenses and
counterclaims, on the following grounds:

- l. Plaintiffs have failed to state a cause of action upon which relief can be granted.
  - 2. Plaintiffs have no standing to institute this action

- 3. Plaintiff The City of Rochester lacks the capacity to both sue as an individual party and at the same time to represent plaintiff Donald Bunch.
- 4. Plaintiffs have failed to allege any facts which would entitle them to preliminary injunctive relief nor have they shown any likelihood of success on the merits, nor irreparable harm.
- 5. That the attendant pleadings to the Order to Show Cause are fatally defective in that there is no supporting affidavit by the named plaintiff Donald Bunch, merely the hearsay affidavit of Louis N. Yash.
- 6. That the defendant Monroe County Civil Service Commission is being irreparably harmed and caused to violate the New York State Civil Service Law and the rights of those individuals who qualify for the position provisionally held by the plaintiff Donald Bunch and is thwarted in the performance of its duty to the community and general public at large.

WHEREFORE, defendant Monroe County Civil Service Commission respectfully requests this Court to vacate the aforesaid Order to Show Cause and dismiss the Preliminary Injunction currently in effect and the dismissal of the main cause of action and for such further relief as to this Court may seem just and proper.

WILLIAM J. STEVENS
Attorney for Defendant
Monroe County Civil
Service Commission
JOSEPH C. PILATO, of Counsel
Office & P. O. Address
307 County Office Building
Rochester, New York 14614
Telephone: (716) 428-5280

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK THE CITY OF ROCHESTER, Individually and on behalf of Donald Bunch; and DONALD BUNCH, Individually, and on behalf of all others similarly situated, Plaintiffs. AFFIDAVIT THE MONROE COUNTY CIVIL SERVICE COMMISSION consisting of GERALD B. HANNA, MICHAEL D. CERAME, JOSEPH T. DEVITT, ROPERT B.NELLIS and GEORGE H. SCHEIBLE, Commissioners and its Executive Director, FREDERICK W. LAPPLE; and the STATE OF NEW YORK, Defendants. STATE OF NEW YORK ) COUNTY OF MONROE ) SS. CITY OF ROCHESTER ) JOSEPH C. PILATO, being duly sworn, deposes and says: 1. That I am an attorney and counsellor at law duly licensed to practice my profession in the State of New York and am admitted to practice before the United States District Court for the Western District of New York. 2. That I am currently employed in the Monroe County Attorney's office which is the legal and lawful representative of the defendant Monroe County Civil Service Commission. 3. That this affidavit is made in support of the attached motion to vacate and dismiss the order to show cause already before this Court. 4. That this Court lacks sufficient jurisdiction of the parties and subject matter in that Rule 17 (a) of the Federal Rules of Civil Procedure requires as follows:

"An action shall be prosecuted in the name of the party who by substantive law as the right sought to be enforced."

U.S. v. St. Regis Paper Company, 106 F. Supp. 286; Doherty v. Mutual Warehouse Company, 245 F. 2d 609

The plaintiff The City of Rochester has alleged in its supporting affidavit of the order to show cause no substantive right or interest under State law or Federal law and is therefore not a real party in interest. In addition, there is no supporting affidavit by the plaintiff Donald Bunch and no allegation of facts sufficient under the Federal Rules of Procedure for the granting of the extraordinary relief requested.

#### 5. That Title 28 USC § 1359 states:

"A district court shall not have jurisdiction over a civil action in which any party by assignment or otherwise has been improperly or collusively made or joined to invoke the jurisdiction of such court."

That the plaintiff The City of Rochester has so improperly joined the plaintiff Donald Bunch and further that the plaintiff The City of Rochester is a potential adverse party in which case its allegation of representing the plaintiff Donald Bunch violates Rule 28 (a) of the Federal Rules of Civil Procedure.

- 6. That the affidavit used to obtain the within order to show cause was fatally defective and insufficient in that it did not allege facts which would show irreparable harm to The City of Rochester, necessitate the extraordinary relief of preliminary injunction, and did not state a basis nor facts sufficient to show standing to pursue said relief.
- 7. That the granting of said order to show cause and preliminary injunction was improper in that it adversely affects those individuals who would be entitled to fill the above mentioned titled position, causes the Monroe County Civil Service Commission to be in violation of § 61 of the New York State Civil Service Law and be liable both to the New York State Civil Service Commission and any affected Individual. That, in addition,

the freezing of an individual in said position in violation of New York State law does irreparable harm to all employees subject to Civil Service Law and the community at large pursuant to the legislative intent of said law.

- 8. That the plaintiff The City of Rochester is the appointing authority for the job title which is the subject of the above entitled action and as such cannot be a party to this proceeding and at the same time represent fairly and completely the rights of the alleged plaintiff Donald Bunch.
- 9. That said order to show cause should be vacated as well as the dismissal of all above entitled papers and proceedings in view of the misstatement of the capacity of Donald Bunch in that said title clearly implies a class action by Donald Bunch and indirectly a class action by The City of Rochester. That Rule 23 of the Federal Rules of Civil Procedure \$8 (a) and (b) define the bases in law for a class action and that neither the allegations contained in the supporting affidavit nor the allegations contained in the alleged summons and complaint satisfy this rule.
- 10. That the cause of action-attendant to the order to show cause and served upon the defendant Monroe County Civil Service Commission fails to state a cause of action upon which relief may be granted to the plaintiffs and further does not satisfy the requirements of jurisdiction and standing and is on its face fatally defective and must be of force summarily dismissed.
- 11. That all pleadings were served improperly upon the defendant Monroe County Civil Service Commission without notice and without justification in law or fact for the relief requested.

WHEREFORE, your deponent prays for an order that this Court vacate the aforesaid order to show cause, dismiss the preliminary injunction.

and further dismiss the summons and complaint attendant to the above entitled action and for such further relief as to this Court may seem just and proper.

Sworn to before me this

// day of July, 1975.

oseph C. Pilato

MARY C. HENDRIX

NOTARY PUC!IC, 21913 of if Y., Monroe County

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UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK

THE CITY OF ROCHESTER, Individually, and on behalf of Donald Bunch; and DONALD BUNCH, Individually, and on behalf of all others similarly situated,

Plaintiffs,

VS.

AFFIDAVIT
Civil Action
No. 75-266

THE MONROE COUNTY CIVIL SERVICE COMMISSION Consisting of GERALD B. HANNA, MICHAEL D. CERAME, JOSEPH T. DEVITT, ROBERT B. NELLIS and GEORGE H. SCHEIBLE, Commissioners, and its Executive Director, FREDERICK W. LAPPLE; and the STATE OF NEW YORK,

Defendants.

Paul W. Brayer and H. Brent Matthewson, being duly sworn, depose and say:

- 1. Paul W. Brayer is the duly appointed Personnel Director of the City of Rochester; H. Brent Matthewson is the duly appointed Affirmative Action Officer of the City of Rochester. Both deponents make this affidavit in support of the motion for a preliminary injunction herein.
- 2. The purpose of this affidavit is to provide the Court with a sample of statistics supporting the Plaintiffs' claim that Section 61 of the New York State Civil Service Law has an unlawful disparate effect on minority group members as stated more fully in paragraphs 12, 13 and 14 of the complaint.
- 3. In the most recent civil service examination for permanent appointment to the position of Recreation Sector Leader, the one minority group member who took and passed the exam did not place in the top three examinees and therefore is not eligible for permanent appointment to the

position. Significantly, this particular person had already demonstrated minimum merit and fitness for the position by serving provisionally in the position to the complete satisfaction of his supervisors and superiors. 4. In the most recent civil service examination for permanent appointment to the position of Recreation Leader I, the two minority group members who took and passed the exam did not place in the top three examinees and therefore are not eligible for permanent appointment to the position. 5. In the most recent civil service examination for permanent appointment to the position of Recreation Leader II, the one minority group member who took and passed the exam did not place in the top three examinees and therefore is not eligible for permanent appointment to the position. 6. Presently in the Department of Parks and Recreation of the City of Rochester there are ten positions of Recreation Sector Leader; not one of those positions is permanently filled by a minority group member. 7. Presently in the Department of Parks and Recreation of the City of Rochester there are twenty-seven positions of Recreation Leader II; and only one is permanently filled by a minority group member. 8. Presently in the Department of Parks and Recreation of the City of Rochester there are thirty-one positions of Recreation Leader I; and only one is permanently filled by a minority group member. 9. Even though these statistics provide only a sampling of the results of the most recent civil service examination, they demonstrate that members of minority groups, although they take and pass the exams, are

not eligible to be permanently appointed to positions of public employment. We believe this impact of the operation of Section 61 of the Civil Service Law is both unconstitutional and in violation of the United States Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act of 1972.

10. We wish to bring to the Court's attention that we, as officers of the City of Rochester, do not have access to further statistics at this time because such statistics are in the custody and possession of the Defendant Monroe County Civil Service Commission.

Paul W. Brayer

D. Event Wattween

H. Brent Matthewson

Sworn to before me this

day of thele, 1975

Notary Public

Louis N. Kash

NOTARY PUBLIC, State of N. Y., Monroe C.

My Commission expires March 30, 19.

THE CTTY OF ROCHESTER, Individually, and on behalf of Donald Bunch; and DONALD BUNCH, Individually, and on behalf of all others similarly situated,

Plaintiffs,

VS.

Civil Action No. 75-266

THE MONROE COUNTY CIVIL SERVICE COMMISSION Consisting of GERALD B. HANNA, MICHAEL D. CERAME, JOSEPH T. DEVITT, ROBERT B. NELLIS and GEORGE H. SCHEIBLE, Commissioners, and its Executive Director, FREDERICK W. LAPPLE; and the STATE OF NEW YORK,

Defendants.

Jeffrey Swain, being duly sworn deposes and says:

- 1. I am the duly appointed Commissioner of Parks and Recreation of the City of Rochester, and as such am charged with the duty and responsibility of managing the facilities and programs of the Department of Parks and Recreation and have the power and authority to appoint persons to positions of public employment in the Department. I make this affidavit in support of the motion for a preliminary injunction herein.
- Recreation Sector Leaders. Each Recreation Sector Leader is responsible for supervising recreation centers, activities and personnel in one sector of the City; each sector is approximately the size of one-quarter of the City. Therefore, the job of Recreation Sector Leader is a full-time job covering, several recreation centers, a great variety of recreation activities and a geographic area of several square miles. It requires supervision of 30 to 40 lower grade personnel. It also requires constant contact with community members and groups of all ages, interests and Backgrounds. It is one of the key positions in the Department of Parks and Recreation.
- 3. Donald Bunch, one of the Plaintiffs herein, has been serving in a provisional capacity in the position of Recreation Sector Leader

for approximately 1 1/2 years. In my opinion, and the opinion of my predecessors, he has been an adequate and effective employee in this position.

- 4. Presently, the Plaintiff Bunch is not serving as a Recreation Sector Leader because of the refusal of the Defendant Monroe County Civil Service Commission to certify him as eligible for permanent appointment to that position. I have not appointed any other person to fill that position. I believe that Section 61 of the New York State Civil Service Law has an unlawful disparate effect on minority group members, and particularly on Mr. Bunch, as stated more fully in paragraphs 12, 13 and 14 of the complaint.
- of Recreation Sector Leader held by Mr. Bunch until recently be filled by a qualified individual at the earliest possible moment. It will be difficult, if not impossible, to operate the recreation program of the City of Rochester effectively in the particular sector involved without filling the position of Recreation Sector Leader. Although I am making attempts to supervise and operate the sector through the partial assistance of other Sector Leaders, this method of operation cannot centinue without causing serious harm to the other sectors by depriving birem of the full-time supervision of their own Recreation Sector Leaders.
- 6. I am reluctant to appoint anyone other than Mr. Bunch to the vacant position of Recreation Sector Leader permanently because, once that is done, there will be no position of Recreation Sector Leader available for Mr. Bunch should he win this lawsuit. Consequently, Mr. Bunch could

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win the lawsuit and still have no practical relief available to him.

Jeffra Swin

Sworn to before me this

It day of July, 1975.

Notary Public

Louis N. Kash
NOTARY FUCUS, State of N. Y., Monroe Co.
My Commission explica March 30, 19...

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK THE CITY OF ROCHESTER, Individually, and on behalf of Donald Bunch; and DONALD BUNCH, Individually, and on behalf of all others similarly situated,

Plaintiffs,

AFFIDAVIT OPPOSING PRELIMINARY INJUNCTION

vs.

THE MONROE COUNTY CIVIL SERVICE COMMISSION, Consisting of GERALD B. HANNA, MICHAEL D. CERAME, JOSEPH T. DEVITT, ROBERT B. NELLIS and GEORGE H. SCHEIBLE, Commissioners, and its Executive Director, FREDERICK W. LAPPLE: and the STATE OF NEW YORK,

Defendants.

Civil Action No. 75-266

STATE OF NEW YORK COUNTY OF MONROE SS.: CITY OF ROCHESTER )

PAUL O. HARRISON, being duly sworn, deposes and says, upon information and belief, as follows:

- That your deponent is an Assistant Attorney General on the staff of Hon. Louis J. Lefkowitz, Attorney General of the State of New York, attorney of record for the STATE OF NEW YORK, named as a defendant herein.
- That your deponent makes this affidavit as counsel on behalf of said defendant in opposition to the plaintiffs' request for a preliminary injunction and a permanent injunction herein; however, reserving all rights to move against and to answer the complaint herein.

Page 2 That as appears from the Complaint herein, the 3. plaintiffs are asking that a State Statute, New York Civil Service Law, Section 61, be declared violative of the Fourteenth Amendment to the Constitution of the United States and of the Civil Rights Act of 1964 as amended by the Economic Opportunity Act of 1972, and that the acts of state officers and others acting for them or in concert with them in enforcing the provisions of New York Civil Service Law, Section 61, in pursuance of the duties imposed upon them by said Statute be permanently enjoined; and that during the pendency of this action for permanent injunction, that such acts of the state officers and others be preliminarily enjoined. That upon the foregoing, and by reason of 4. 28 U.S.C. §2281 a single-judge District Court is without jurisdiction to grant either the interlocutory or the permanent

injunction prayed for.

WHEREFORE, this Court should deny the plaintiffs' request for injunctive relief.

Sworn to before me this

10th day of July, 1975.

ALMA A. GOODSITE NOTARY PUBLIC, State of N. Y., Monroe County My Commission Expires March 30, 19 7.6..

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

THE CITY OF ROCHESTER, Individually and on behalf of Donald Bunch; and DONALD BUNCH, Individually and on behalf of all others similarly situated,

Plaintiffs,

-V8-

ANSWER

THE MONROE COUNTY CIVIL SERVICE COMMISSION consisting of GERALD B. HANNA, MICHAEL D. CERAME, JOSEPH T. DEVITT, ROBERT B. NELLIS and GEORGE H. SCHEIBLE, Commissioners and its Executive Director, FREDERICK W. LAPPLE; and the STATE OF NEW YORK,

Civil Action File No.

75-266

Defendants.

To the above named Plaintiffs: the above named defendants through the Monroe County Attorney's Office, Joseph C. Pilato, of Counsel, as and for their Answer, hereby allege as follows:

- 1. Admits so much of the allegations contained in the paragraphs of the Plaintiffs' complaint, designated, "2", "4", "5", "7", "8", "9", "11" and "12".
- 2. Lacks sufficient information to form a belief as to the allegations contained in the paragraphs of the Plaintiffs' complaint designated, "3", "6" and "10".
- 3. Denies each and every allegation contained in the paragraphs of the Plaintiffs' complaint designated, "1", "13" and "14".
- 4. Denies each and every allegation contained in the Plaintiffs' complaint not heretofore specifically admitted.

## AS AND FOR A FIRST AFFIRMATIVE DEFENSE

5. The Monroe County Civil Service Commission and its Executive Director and Commissioners, all above named, have at all times hereinafter named complied with all of the requisites, rules, regulations and laws of the State of New York, and of the

United States and further pursuant to those laws have faithfully, fairly and accurately applied those laws in all cases and specifically to the instances raised by the Plaintiff in this action. 6. That the above named Commissioners and Executive Director of the Monroe County Civil Service Commission maintain an office at 209 County Office Building, Rochester, New York 14614. 7. That Plaintiffs have failed to state a cause of action upon which relief can be granted. AS AND FOR A SECOND AFFIRMATIVE DEFENSE 8. That the Defendants repeat and reallege as if fully set forth each and every allegation contained in Plaintiffs' complaint as admitted by Defendants and further as designated in paragraphs "5" - "7" inclusive. 9. That the Plaintiffs have no standing to institute this action. · AS AND FOR A THIRD AFFIRMATIVE DEFENSE 10. Repeats and realleges each and every allegation as if fully set forth designated paragraph "8", and all allegations of Defendants specifically admitted above. 11. That upon information and belief the Plaintiff, City of Rochester, has been guilty of many acts of discrimination against minority individuals, in the past and this continues to the present time. 12. That the Plaintiff, City of Rochester, has itself

failed through its own inaction to effectively implement the affirmative action plan which is annexed to the complaint before this Court.

13. That therefor the Plaintiff, City of Rochester, is an adverse party and liable in damages and other legal

remedies to the Plaintiff, Donald Bunch, and by their joinder as equal plaintiffs have effectively denied proper remedies to the Plaintiff, Donald Bunch, and also effectively denied defenses to all of the above named Defendants.

# AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

14. The Plaintiffs have failed in their complaint to allege any acts which would entitle them to the relief requested and in fact their cause of action is without basis or merit.

# AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

- 15. Repeats and realleges each and every allegation contained in paragraph "10" as if fully set forth.
- 16. That among the individuals who took the examination which formed the basis for the certification and civil service list, which purports to be the basis of this Court action, there were two individuals both women who placed in the top three of said civil service test.
- 17. That women are among those classes of individuals which the 14th Amendment of the United States Constitution and the Constitution of the State of New York and the Equal Employment Acts of both the New York State and United States Government, as well as the Civil Rights Act of 1964, as amended, by the Economic Opportunity Act of 1970, seeks to protect.
- 18. That women also are included in the affirmative action plan as delineated in the exhibits next to the Plaintiffs' complaint.
- 19. That contrary to the allegations of the Plain-tiffs' complaint, their actions in the past and this cause of action in the present seek to discriminate against those two women above named, as well as all similarly situated minority individuals placed above the Plaintiff, Donald Bunch.

20. That the actions of the Plaintiff in instituting this cause of action are a direct violation of the laws and statutes of the State of New York and the laws and statutes of the United States Government as above delineated.

# AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

- 21. Repeats and realleges each and every allegation contained in paragraph "10" as if fully set forth.
- 22. That both Plaintiffs are barred from maintaining this action by their failure to object to any of the questions on the exam which forms the basis of this action, that their failure to apply for exempt status for this position and their failure to avail themselves of existing New York State Law and administrative relief; that therefore the Plaintiffs are improperly before this Court and have failed to state a Federal question.

### AS AND FOR A COUNTERCLAIM ON BEHALF OF THE ABOVE NAMED DEFENDANTS

- 23. The above named Defendants, Monroe County Civil Service Commission, had been compelled by virtue of this same cause of action to expend monies and suffer various costs, inconveniences and disruption of their normal and usual operation.
- 24. That the above losses are caused solely by the actions of the Plaintiffs in the proceeding, who have acted without any basis in law or fact.
- 25. The above named Plaintiffs are, therefore, liable to the Defendants for all costs and injuries incurred.

WHEREFORE, Defendants, Monros County Civil Service Commission consisting of Gerald B. Hanna, Michael D. Cerame, Joseph T. Devitt, Robert B. Nellis and George H. Scheible, Commissioners and its Executive Director, Frederick W. Lapple, respectfully request this Court to vacate any orders to show cause, and forther to dismiss the above entitled cause of action and for compensation for losses as alleged in its counterclaim, and for such further relief as to this Court may seem just and proper.

WILLIAM J. STEVENS
Monroe County Attorney
JOSEPH C. PILATO, of Counsel
307 County Office Building
Rochester, New York 14614

STATE OF NEW YORK)
COUNTY OF MORROE ) SS.
CITY OF ROCHESTER)

JOSEPH C. PILATO, being duly sworn, says that he is

JOSEPH C. PILATO, being duly sworn, says that he is of Counsel for the Defendants above named. He has read the foregoing Answer and the allegations contained therein are true to his knowledge, except those stated to be upon information and belief, and as to those he believes them to be true.

JOYAPH C. PILATO

Sworn to before me this

234 day of July, 1975

MARY C. HENDRIX

NOTARY PUBLIC, State of N Y., Monroe County

My Commission Capital Street Street

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF HEW YORK

THE CITY OF ROCHESTER, Individually and on behalf of Donald Bunch; and DONALD BUNCH, Individually, and on behalf of all others similarly situated,

## Plaintiffs

- VS -

CIVIL 75-266

THE MONROE COUNTY CIVIL SERVICE COMMISSION consisting of GENALD B. HANNA, MICHAEL D. CERAME, JOSEPH T. DEVITT, ROSERT B. NELLIS and GEORGE H. SCHEIDLE, Commissioners and its Executive Director, FREDERICK W. LAPPLE; and the STATE OF NEW YORK.

## Defendants

Louis N. Kash Corporation Counsel, City of Rochester 46 City Hall Rochester, N.Y. 14614 Attorney for plaintiffs

William J. Stevens
307 County Office Building
Rochester, N.Y. 14614
Attorney for Monroe County Civil Service
Commission

Paul O. Harrison Assistant Attorney General of New York 65 Broad Street Rochester, N.Y. 14614 Attorney for State of New York

Daan Braveman 80 West Main Street Rochester, N.Y. 14614 Attorney for applicants to intervene

The complaint herein was filed July 3, 1975. The plaintiffs seek a declaratory judgment that Section 61 of the New York State Civil Service Law violates the Pourteenth Amendment of the United States Constitution and the United States Civil Rights Act of 1964 as amended by the Economic Opportunity Act of 1972 to the extent that it discriminates against the promotion and appointment of minority group members to permanent positions of public employment, and to the extent that it obstructs unlawfully the effective implementation of the city's affirmative action plan and an order restraining and enjoining the defendants from enforcing the provisions of Section 61 of the New York State Civil Service Law to the extent that said Section requires permanent appointment or promotion to positions of public employment only from among the three highest standing persons who have taken and passed a competitive civil service examination.

The plaintiffs applied for and obtained an order to show cause dated July 3, 1975 why this court should not grant a preliminary injunction.

The matter came on for argument before this court on July 14, 1975 and was finally submitted for decision on August 7, 1975 upon written memoranda.

This court finds that there is no showing that the plaintiffs are likely to succeed in this action, nor is there any showing that the plaintiffs will be irreparably harmed if a preliminary injunction does not issue.

The application for a preliminary injunction is denied.

By motion filed July 14, 1975 the Honroe County Civil Service Commission moves to dismiss the action upon grounds specifically stated in the motion.

The motion to dismiss the action is denied.

By notice of motion filed August 25, 1975,

Josephine Williams and James Hunter move for an order

permitting them to intervene as plaintiffs. The matter

came on for argument on September 8, 1975 and was submitted

Beptember 29, 1975 on written memoranda.

The intervention would severely delay, prejudice and interfere with the adjudication of the rights of the original parties in this action.

The motion to intervene is in all respects denied.

ALL OF THE ABOVE IS SO ORDERED.

Cand R. Burke

HAROLD P. BURKE United States District Judge

February \_// . 1976.

GPC/Yn 3/3/70

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK

THE CITY OF ROCHESTER, Individually and on behalf of DONALD BUNCH; and DONALD BUNCH, Individually and on behalf of all others similarly situated,

Plaintiffs,

-VS-

THE MONROE COUNTY CIVIL SERVICE COMMISSION consisting of GERALD B. HANNA, MICHAEL D. CERAME, JOSEPH T. DEVITT, ROBERT B. NELLIS and GEORGE H. SCHEIBLE, Commissioners and its Executive Director, FREDERICK W. LAPPLE; and the STATE OF NEW YORK,

Defendants.

NOTICE OF APPEAL

CIVIL 75-266

Notice is hereby given that THE CITY OF ROCHESTER, Individually and on behalf of DONALD BUNCH; and DONALD BUNCH, Individually and on behalf of all others similarly situated, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Second Circuit from the decision and order denying plaintiffs' application for a preliminary injunction entered in this action on the 13th day of February, 1976.

Dated: Rochester, New York

March 8 , 1976

Jani D. Frank LOUIS N. KASH

Corporation Counsel City of Rochester

46 City Hall

Rochester, New York 14614 Attorney for Plaintiffs

64

# CERTIFICATE OF SERVICE I hereby certify that on the 28th day of May, 1976, I served the foregoing Appendix upon counsel for the Appellees, by causing copies to be mailed, postage prepaid, to: Joseph C. Pilato, Esq. Deputy County Attorney 307 County Office Building Chester, New York 14614 LOUIS N. KASH Dated: May 28, 1976